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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Accounting for Judgments and Other Costs Associated with Litigation	))	CC Dkt. No. 93-240

AMERITECH OPERATING COMPANIES' COMMENTS

The Ameritech Operating Companies (Ameritech),[1] pursuant to §§ 1.415 and 1.419 of the Federal Communications Commission's (Commission) rules, 47 C.F.R. §§ 1.415 and 1.419, respectfully submit these comments in response to the Commission's Notice of Proposed Rulemaking on the accounting for litigation expenses.[2] While Ameritech supports the comments filed by the United States Telephone Association (USTA), Ameritech submits these additional comments in support of USTA's position. Ameritech's comments are limited to the Commission's proposal that the Commission's litigation rules for federal antitrust violations should apply when carriers are found to have violated other federal statutes.

On September 9, 1993, the Commission released its NPRM on litigation costs. In the Notice, the Commission proposes to establish accounting rules and ratemaking polices for litigation costs incurred by carriers in federal antitrust lawsuits and other cases involving federal statutes. The Notice is in response to two decisions by the United States Court of Appeals for the District of Columbia Circuit vacating and remanding these rules and policies to the Commission.[3]

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[1] The Ameritech Operating Companies are: Illinois Bell Telephone Company, Indiana Bell Telephone Co., Inc., Michigan Bell Telephone Company, The Ohio Bell Telephone Company, and Wisconsin Bell, Inc.

[2] Accounting for Judgments and Other Costs Associated with Litigation, CC Dkt. No. 93-240, FCC 93-424, 8 FCC Rcd. (September 9, 1993) (*NPRM* or *Notice*).

[3] Mountain States Tel. and Tel. Co. v. FCC, 939 F.2d 1035 (D.C. Cir. 1991) (*Litigation Costs Decision*); and Mountain States Tel. and Tel. Co. v. FCC, 939 F.2d 1021 (D.C. Cir. 1991) (*Litton Accounting Appeal*).

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In the NPRM, the Commission proposes to treat antitrust judgments and settlements as presumptively unlawful for the purposes of ratemaking. Only those costs that constitute saved litigation expenses in a prejudgment settlement would be eligible to be treated as regulated expenses. The Commission also proposes that any costs of litigating those antitrust cases be captured in Account 1439 until the outcome of the case. If the carrier wins the antitrust complaint, then the litigation costs would be treated above the line. If the carrier loses the case, then the costs would be treated below the line. The Commission's proposed rules for antitrust cases are based upon the presumption that ratepayers should not have to pay for anticompetitive behavior -- the basis of an antitrust complaint -- since it does not produce any benefit for ratepayers.[4]

The Commission also seeks to extend that presumption and accounting treatment to actions in which carriers are found to have violated other federal statutes. Specifically, the Commission proposes two alternatives. First, the Commission proposes to have the Commission review on a case by case basis the costs for those lawsuits which allege a violation of a federal statute and in which the settlement and judgment exceed a threshold amount. The Commission proposes to establish a threshold amount because reviewing all such costs would be an inefficient use of the Commission's scarce resources. Second, the Commission proposes to establish a list of those federal violations for which it can be assumed that the carrier's actions did not benefit ratepayers. The Commission argues that either of these approaches is consistent with the "ratepayer benefit standard," in that ratepayers should not pay for actions, giving rise to lawsuits, from which the ratepayers did not benefit.[5]

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[4] Notice at ¶¶ 9-19.

[5] Id. at ¶¶ 20-25.

Neither of these options should be adopted by the Commission. In this regard, the first option that the Commission review litigation expenses above a threshold amount when carriers are found to violate federal statutes is a waste of the Commission's resources. Under the myriad federal statutes with which carriers must comply, there can be no reasonable presumption or finding that the ratepayer did not benefit. For example, carriers must comply with environmental laws, securities laws, tax laws, employment laws, and occupational and safety laws. Under any of those statutes, a carrier's violation of the law most likely results from a reasonable interpretation of the statute, and from an interpretation in which ratepayers easily would have benefited. In this regard, if a carrier violated the law, especially tax and environmental laws, it most likely did so in such a way as to interpret the law to limit or decrease expenses to the company. Thus, under such a scenario, the ratepayers benefit from lower expenses. Consequently, these litigation expenses should be treated as a normal expense.[6]

Furthermore, based on the foregoing analysis, Ameritech cannot think of a single situation in which the violation of a federal statute can lead to a *reasonable* presumption that the ratepayer did not benefit. Therefore, it is unlikely that the Commission can compile a list for which this presumption can apply.

Finally, the Commission requested comment on the impact of these options on carriers' incentives. As noted above, carriers will act in the best interests of the company which benefits both ratepayers and shareholders. The necessary incentives already exist for carriers to act prudently. Therefore, it is

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[6] Such treatment is also consistent with the Court's decision in the *Litton Accounting Appeal*. In that decision, the Court vacated the Commission's requirement for carriers to treat litigation expenses incurred in defending an antitrust claim below the line. The Court stated that "lawsuits are a recurring fact of life in operating a business" and that such litigation expenses are prudently incurred. Therefore the Court reasoned, without a better explanation from the Commission, such expenses should be treated as normal business expenses. 939 F.2d at 1034.

unnecessary for the Commission to create artificial incentives through regulatory rules on litigation expenses.

Based on the foregoing, the Commission should not establish a list of federal violations for which it can be assumed that the carrier's actions did not benefit ratepayers, or establish a review procedure for litigation costs of lawsuits which involve federal statutory claims. Rather the Commission should recognize those expenses as normal business expenses and grant them above the line accounting treatment.

Respectfully submitted,

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